IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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NO. 76-5531

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WALD TRANSFER AND STORAGE COMPANY AND WESTHEIMER TRANSFER AND STORAGE COMPANY, INC., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# INDEX



## AUTHORITIES CITED

### CASES

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, WALD TRANSFER AND STORAGE COMPANY and WESTHEIMER TRANSFER AND STORAGE COMPANY, INC. (herein the "Companies") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 26, 1976.

## OPINIONS BELOW

The Opinion of the Court of Appeals (Apendix A, pp. A1-A2) was ordered not to be published. The decision and Order of the National Labor Relations Board (App. B, pp. B1-B25) is reported at 218 NLRB No. 73 (1975). The Opinion of the Administrative Law Judge is also appended hereto (App. C1-C17).

## JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit enforcing the order of the National Labor Relations Board, was entered on July 26, 1976. The Petition for Rehearing filed by the Companies was denied on September 20, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

The Companies refused to bargain with the recognized but uncertified Union asserting a good-faith doubt of majority representation. The Administrative Law Judge found that no unfair labor practices had been committed and that a good faith doubt existed. The National Labor Relations Board revised the Administrative Law Judge's opinion in a split decision and held that the Companies had failed to rebut the presumption of majority status enjoyed by the Union. The Court of Appeals enforced the Order of the Board. The questions presented are:

1. Whether or not the Court below was correct in concluding that the inference of absence of good faith doubt could be used as evidence under the substantial evidence rule?



2. Whether or not the Court below was correct in concluding that the inference of absence of good faith doubt has a reasonable basis in the facts shown by the record as a whole, after the current agreement had expired, and the Companies expressed a good faith doubt of majority support of the Union by the bargaining unit?

3. Whether or not, in a right to work state, dues check-off cards can be used as the sole basis for asserting a good faith doubt of an uncertified Union?

## STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. §151, et.seq. ("the Act") are as follows:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."
>
> "Sec. 8(a)(1). It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."
>
> "Sec. 8(a)(5). It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

## STATEMENT OF THE CASE

This case originated from charges brought by the General Drivers, Warehousemen and Helpers, Local No. 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called "the Union", before the National Labor Relations Board against Petitioners, Wald and Westheimer, alleging that their rights under Sections 8(a)(1) and (5) of the Act were violated by the Companies. The violations charged the Petitioners with using deliberate dilatory and evasive tactics in an effort to avoid their legal bargaining obligation and secondly, with a refusal to bargain on or after April 11, 1974, predicated on a good faith and reasonably grounded doubt of the Union's representation of a majority of the employees in the bargaining unit. In due course, a complaint was issued by the General Counsel and a hearing was held before an Administrative Law Judge who held that neither Company had engaged in the unfair labor practices alleged in the complaint. On June 18, 1975, the National Labor Relations Board revised the Administrative Law Judge as to the portions of the complaints regarding the refusal to bargain in good faith, with one member dissenting.

Subsequently, the Board petitioned the Court of Appeals for the Fifth Circuit asking the Board's Order to be enforced. The Court of Appeals found that the "inference of absence of good faith doubt, drawn by the majority of the Board, and the opposite inference that there was good faith doubt, drawn by the employers, both have reasonable basis in the facts as shown by the record as a whole" and under the substantial evidence rule the Board's findings must stand. The Judgment was entered on July 26th, 1976. (App. D1-D2). The Companies duly



filed their Petition for Rehearing (App. E1-E9) which was denied on September 20, 1976. (App. F1).

It appears from the action of the Court below in this case that the substantial evidence rule has been misapplied. Certiorari is sought to review this recurrent predicament that employers are found in from time to time and the conflicting administration of justice in federal courts, which should be resolved by this Court's exercise of its general supervisory power.

## REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents An Issue Of Critical Importance in the Administration of the National Labor Relations Act and Presents an Additional Aspect of the Issues before the Court in *Linden Lumber Division, Summer & Co. v. National Labor Relations Board,* 419 U.S. 301 (1974).

This case involves the law surrounding withdrawal of recognition of a bargaining representative. The law is well settled that an employer may lawfully refuse to bargain with an incumbent Union even though, as here, it is not certified, only if, at the time of its refusal, he has a good faith doubt that the Union no longer represents a majority of the employees in the bargaining unit. *N.L.R.B. v. Crimptex, Inc.,* 517 F.2d 501 (1st Cir. 1975); *Lodges 1746 & 743, Int. Assn. of Mach. & Aero. Wkrs. v. N.L.R.B.,* 416 F.2d 809 (D.C. Cir. 1969).

Here, as in *Linden,* the Union was faced with employers unwilling to bargain. Instead of filing for an election, the Union pressed unfair labor practice charges against the employer under Sections 8(a)(1) and 8(a)(5). Again, the basic issue becomes the Board's application of its good

faith doubt test to the employer's actions in refusing to bargain. The pertinent standard has two components: a reasonable basis in fact, and good faith. *Lodges 1746 & 743, Int. Assn. of Mach. & Aero. Wkrs. v. N.L.R.B., supra,* 416 F.2d 812.

The Companies urge that the Court below and the Board improperly applied the applicable test. The law is well settled that a union, during the first year following its *certification enjoys, absent special circumstances,* an irrebuttable presumption of majority status. *Brooks v. N.L.R.B.,* 348 U.S. 96 (1954); *Celanese Corporation of America,* 95 N.L.R.B. 664 (1951). Thereafter the presumption continues, but is rebutted where a company establishes either that the union in fact lost its majority or that the employer had a good faith doubt as to the union's continuing majority status. *Brooks v. N.L.R.B., supra* at 348 U.S. 104; *Ingress-Plastene, Inc., v. N.L.R.B.,* 430 F.2d 542, 546 (7th Cir. 1970); *Zim's Foodliner, Inc. v. N.L.R.B.,* 495 F.2d 1131, 1139 (7th Cir. 1974), *Orion Corporation v. N.L.R.B.,* 515 F2d 81, 85 (7th Cir. 1975). Once that presumption has been rebutted, the burden shifts to the Board to prove the union in fact represented a majority of the employees at the time the employer withdrew recognition. *Orion Corporation v. N.L.R.B., supra* at 515 F.2d 85; *Automated Business Systems v. N.L.R.B.,* 497 F.2d 262, 270 (6th Cir. 1974).

The Seventh Circuit has recently had occasion to consider the issue of proof necessary to support a "good faith doubt." In *Orion,* the Court concluded:

> "The 'good faith doubt' must satisfy an objective test, although subjective evidence may be used to bolster the argument that such doubt existed at the relevant time." 515 F.2d at 85.



The Companies submit that the considerations upon which its doubt was based satisfy this test and accordingly rebut the presumption of the Union's continuing majority status.

Although it seems well settled that an expiring collective bargaining agreement gives rise to a rebuttable presumption of majority status of the union, such does not deprive the employer of its right, even after entering into negotiations on a new contract, to show that it has a good faith doubt about the union representing a majority of its employees. *N.L.R.B. v. Dayton Motels, Inc.,* 474 F.2d 328 (6th Cir. 1973); *Lodges 1746 and 743, Int. Assn. of Mach. & Aero. Wkrs. v. N.L.R.B., supra.*

The Board has recognized that an employer's good faith doubt need not rest upon any one factor. *Lloyd McKee Motors, Inc.,* 170 N.L.R.B. 1278, 1279 (1968). Recently this was restated by the Board:

> "While it is clear . . . that each of the factors relied on by the Respondent standing alone may have weaknesses as a basis for supporting a good faith doubt of the Union's majority status, we note that the Respondent does not rely on any one reason alone, but rather on all as a whole. In our opinion, the Respondent has produced sufficient evidence when considered in its entirety . . . to support Respondent's decision to reassess the union's majority status." *Taft Broadcasting, WDAF-TV, AM-FM,* 201 N.L.R.B. 801, 803 (1973).

Similarly the Seventh Circuit has recognized that it is often the cumulative effect of several considerations that support a reasonably based doubt of majority status:

> "Although the Board attacks each of the reasons advanced by the Company in Support of its good

> faith doubt of the union's majority status, the Company does not rely on any one reason alone, but rather on all as a whole. We think the entire record including evidence, against the Board's position as well as in favor of it . . . supports the Company's position." *Ingress-Plastene, Inc. v. N.L.R.B.*, 430 F.2d at 547.

Thus it is apparent that the Board in practice did not follow the rule adopted by it in *Taft Broadcasting, WDAF-TV, AM-FM, supra,* and adhered to by the Seventh Circuit in *Ingress-Plastene, Inc., supra,* and the Sixth Circuit in *National Cash Register v. N.L.R.B.*, 494 F.2d 189, 195 (1974) that in assessing an employer's doubt at the time it withdraws recognition, due consideration must be given to the evidence considered in its entirety regardless of whether each objective factor, standing alone, would support a good faith doubt of the Union's majority status.

The Fifth Circuit merely deferred consideration of the issue. Once sufficient evidence has been presented to cast a doubt on the continued majority status, the burden shifts to the general counsel for the Board to prove that, on the critical date, the Union in fact represented a majority of the employees. *Automated Business Systems v. N.L.R.B.*, 497 F.2d 262, 270 (6th Cir. 1974).

2. The Decision Below Is Inconsistent With The Recent Case of *Star Manufacturing Company v. N.L.R.B.*, 78 L.C. §11, 480 (7th Cir. 1976) and the Act Itself.

The Court below recognized that Local 968 was not a certified union and that the Board came forward with no affirmative proof of majority status either for Wald or Westheimer. There has been no card check, no election, no certification, no other form of proof. The Seventh



Circuit Court of Appeals recently recognized even in a situation in which a Union certification existed that to rebut the presumption, the employer need not prove that the Union no longer represents a majority of the employees, but only at the time it refused to bargain there were sufficient objective considerations to support a reasonable doubt of the Union's majority status. *Star Manufacturing Company v. N.L.R.B.*, 78 L.C. §11, 480 (7th Cir. 1976). The Seventh Circuit reversed the Board's decision and in so doing refused to enforce the Board's Order. The Court below refused to consider the *Star* case in the Companies' Motion for Rehearing. (App. E1-E ).

As the record herein reveals, evidence of union membership was only one of several factors relied on by the Companies as a basis for concluding that the Union was a minority union. The other factors relied upon by the Companies in addition to the low number of employees on check-off, when viewed collectively, have all been recognized as elements upon which a reasonable doubt can be sustained.

a. A Minority Authorized Dues Check-Off.

At both companies, on April 30, 1974, less than 50% were shown as dues paying members.

Petitioners concede that employee support cannot necessarily be measured solely or exclusively by the number of employees who become members of the union as expressed through union check-off authorizations. However, reliance on the low percentage of employees authorizing dues check-off as one factor in establishing a reasonable good faith doubt is consistent with the position taken by

the Seventh Circuit in *N.L.R.B. v. H.P. Wasson & Company,* 422 F.2d 558, 561 (7th Cir. 1970) and that of the Eighth Circuit in *National Cash Register v. N.L.R.B., supra,* at 494 F.2d 195 that evidence as to the number of employees on check-off may properly be considered, particularly when the employer relies on other factors in addition to the actual number of employees indicating union membership.

The Courts and the Board have repeatedly held that the number of check-offs is strong evidence of the Union's majority. In *N.L.R.B. v. Howe Scale Co.,* 311 F.2d 502, 504 (7th Cir. 1963), the Seventh Circuit indicated union majority may be inferred where over half of the employees continue voluntary check-offs. Conversely a low maintenance rate is indicative of minority status. In *Convair Division of General Dynamics Corporation,* 169 N.L.R.B. 131 (1968), the Board acknowledged that the low number of employees on check-off may be considered as a negative factor when assessing majority status. Similarly in *Hayworth Roll and Panel Company,* 130 N.L.R.B. 604 (1961), the fact that the union had check-off cards from less than a majority of the employees was a critical factor in the Board's dismissal of the Section 8(a)(5) complaint.

b. Unit Composition Changed Substantially.

Employee turnover, when considered in conjunction with other criteria has been held to be a factor which "could conceivably affect the majority status of a bargaining representative." *National Cash Register Company v. N.L.R.B., supra,* at 494 F.2d 195. See also, *Lloyd McKee Motors, Inc., supra.* Petitioners submit that employee terminations within the bargaining unit, was a significant



factor in assessing the Union's strength, considering the relatively constant size of the bargaining unit, and no indication that either the number of employees on check-off was increasing or that new employees were joining the union. As the Seventh Circuit stated in *N.L.R.B. v. H. P. Wasson & Company, supra,* in which there were check-off cards on file for less than a majority, and little evidence of new employees submitting check-off cards.

"The large turnover and the decrease in check-off cards could reasonably give rise to genuine doubts." 422 F.2d at 561.

c. The Union Was Inactive; It Did Not Assert Its Contractual Rights.

Evidence of lack of activity and ineffectiveness on the part of the incumbent union, as was the case here for four months during contract negotiations, has also been cited as evidence in support of good faith doubt. *Dixie Gas, Inc.,* 151 N.L.R.B. 1257, 1259 (1965); *Viking Lithographers, Inc.,* 184 N.L.R.B. 139 (1970).

Further evidence of the Union's lack of representation of a majority of the bargaining unit can be found when employees at both companies informed company officials of ratification of the proposed agreement by the bargaining unit. Thereafter, Union officials stated that the agreement proposed would not be approved by the International.

d. The Historical Relationship Was Amicable.

Further evidence in support of the Companies' good faith doubt was the fact that historically the parties had an amicable relationship. Prior to withdrawing recognition

the parties had been negotiating collective bargaining agreements for more than 25 years and as the Union's President testified, the parties' relationship had been "very good". See *N.L.R.B. v. Gallaro,* 419 F.2d 97, 102 (2d Cir. 1969). Moreover there is no evidence that the Companies during this long relationship has at any other time been charged with a violation of the Act, nor are there facts herein to suggest that the companies engaged in any activity to undermine the Union's strength.

The aforementioned objective indicia of minority status, considered collectively provided the Companies with sufficient evidence to sustain a reasonable good faith doubt of the Union's majority status.

As the Seventh Circuit has stated:

> ". . . subjective evidence may be used to bolster the argument that such doubt existed at the relevant time." *Orion Corporation v. N.L.R.B.,* 515 F.2d at 85.

Here, the Companies relying on both objective and subjective considerations had valid reasons for doubting the Union's majority status and, having satisfied that good faith doubt test, it was incumbent upon the Board to prove that the Union in fact represented a majority of employees. This the Board could not and did not do. Thus, the Companies having successfully rebutted the presumption of continuing majority status were not obligated to negotiate further with the Union.

The law is clear that an employer cannot justify his refusal to bargain upon the Union's minority status when the Union's loss of majority support is caused by the em-



ployer's own unfair labor practices. *Franks Bros. v. N.L.R.B.,* 321 U.S. 702 (1944). Conversely, where there are not any independent unfair labor practices shown to have any causative effect upon the Union's majority, the courts have refused to impose bargaining orders upon employers like Wald and Westheimer who otherwise have demonstrated sufficient objective considerations upon which to rebut the presumption of majority status.

3. The Decision Below Is Inconsistent With *Universal Camera Corporation v. National Labor Relations Board,* 340 U.S. 474 (1951) and Applied The Substantial Evidence Rule Based On An Erroneous Application Of An Evidentiary Presumption.

The Court below held that an inference of absence of good faith doubt found support in the record as did the opposite inference that there was good faith doubt. The Court then held under the substantial evidence rule that the Board's findings must stand. The Union was voluntarily recognized around 1947 or 1948 and represented the bargaining unit employees from that time until the last contract expired in July of 1973. The Court below recognized that the Union was not a certified Union and the Board failed to come forward with affirmative proof of majority status at either Company. There has been no card check, no election, no certification, and no other form of proof of majority status.

This Court concluded in *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 487 (1951), that a Court of Appeals must satisfy itself that the Board's Order rests on adequate proof. Mr. Justice Frankfurter made it clear that:

> "The substantiality of evidence *must* take into account whatever in the record fairly detracts from its weight." 340 U.S. at 488 (emphasis added).

The Board relied on presumptions only to conclude a lack of good faith doubt on the part of the Companies. The Board has used a rule of presumption of continued majority status of an uncertified Union even though, unlike its certified counterpart, there is no initial basis in fact to support the presumption at the outset. The Board majority relies upon two presumptions that (1) possession by the Union of majority representative status may be presumed from the mere fact of the Respondents' recognition of and dealing with the Union and (2) such status, thus established, is presumed to continue thereafter in the absence of evidence to the contrary.

In the law of evidence, the presumption that a state of things once shown continues to exist does not arise merely upon the basis of some prior presumption. The existence of that which is presumed to continue must originally have been established by evidence. The general rule is stated in 29 Am.Jur.2d *Evidence* §237 (1967):

> "When the existence of a condition or state of facts is once established by proof, an inference or rebuttable presumption arises that the condition or state of facts continues to exist as before, until the contrary is shown. Such inference or presumption is not a rule of law to be applied in all cases, with or without reason, but rather it calls for the exercise of sound discretion by a trial judge according to the likelihood of the persistence of a condition or fact under the circumstances of the case at bar. In general, with the lapse of time such inference or presumption loses probative force."



The Board relies upon the presumption of continued majority status arising out of the voluntary recognition of the Union many years prior to the employers expression of good faith doubt. The presumption or inference is based on no proof in the record supplied by the Board or the Union upon which such presumption can be made.

The Fifth Circuit recognized in the case of *Ref-Chem Company v. N.L.R.B.*, 418 F.2d 127 (5th Cir. 1969), that application of the presumption of a continuing majority is limited by evidentiary considerations of whether it sensibly may be assumed that the *fact* which it purports to establish is true. Not only does the Board rely upon presumption based upon presumption, but the presumption "that possession by the Union of majority representative status may be presumed from the mere fact of the Respondents' recognition of and dealing with the Union" is also based upon a presumption, that being that it is presumed that an employer would not do an unlawful act by entering into a bargaining agreement with representatives of a minority body of the unit.

As was pointed out by the Seventh Circuit in *Interlake Iron Corp. v. N.L.R.B.*, 131 F.2d 129 (7th Cir. 1942):

> ". . . . an inference cannot be piled upon an inference, and then another inference upon that, as such inferences are unreasonable and *cannot be considered as substantial evidence.* Such a method could be extended indefinitely until there would be no more substance to it then the soup Lincoln talked about that was 'made by boiling the shadow of a pigeon that had starved to death'." At pg. 133 (emphasis added).

The Court's Opinion below has allowed the Board to rely, in lieu of evidence, upon presumptions to furnish an inference that there was no basis for a good faith doubt on behalf of the Respondents as to the continuing majority status of the Union as representative of the unit for bargaining purposes. The substantial evidence rule simply will not support the Board's findings under the state of the record before this Court under the holding in *Universal Camera Corp. v. N.L.R.B., supra.*

## CONCLUSION

For the foregoing reasons, Wald Transfer and Storage Company and Westheimer Transfer and Storage Company, Inc., respectfully pray that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX

# APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-2926

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

WALD TRANSFER & STORAGE CO., AND
WESTHEIMER TRANSFER & STORAGE CO., INC.,
*Respondents.*

Application for Enforcement of an Order of
The National Labor Relations Board

(July 2, 1976)

Before GODBOLD, RONEY and HILL, Circuit Judges.

PER CURIAM:

The Board, by a 2-1 vote, found that employers Wald and Westheimer refused to bargain in good faith when they declined to bargain on the ground they had good faith doubt as to whether the incumbent but uncertified union represented a majority of the employees. The inference of absence of good faith doubt, drawn by the majority of the Board, and the opposite inference that there was good faith doubt, drawn by the employers, both have reasonable basis in the facts as shown by the

record as a whole. Under the substantial evidence rule the Board's findings must stand.

The dissenting Board member urged that Board policy should encourage the speedy solution of election in a case such as this rather than prolonged proceedings before the Board and in the courts concerning the good faith doubt of the employer, with no bargaining while the contest runs its course. The argument has some appeal but no applicability in this court in this factual case where opposing permissible inferences exist.

ENFORCED.



## APPENDIX B

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

BRANCH OFFICE

SAN FRANCISCO, CALIFORNIA

Case No. 23-CA-5062

Case No. 23-CA-5063

WALD TRANSFER & STORAGE CO.,

and

WESTHEIMER TRANSFER & STORAGE CO., INC.

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 968, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

*Frank Carrabba, Esq.*, of Houston, Texas, for the General Counsel.

*Eric H. Nelson, Esq.*, of Houston, Texas, for the Charging Party.

*Albert H. Wingate, Esq.*, and *I. J. Saccomanno, Esq.*, of Houston, Texas, on behalf of the Respondents.

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Wald Transfer & Storage Co., and Westheimer Transfer & Storage Co., Inc.

Case Nos.: 23-CA-5062 & 23-CA-5063

| | |
|---|---|
| 4.22.74 | Charge filed in Case No. 23-CA-5062 |
| 4.22.74 | Charge filed in Case No. 23-CA-5063 |
| 6.19.74 | Complaint and Notice of Hearing in Case No. 23-CA-5062, dated |
| 6.19.74 | Complaint and Notice of Hearing in Case No. 23-CA-5063, dated |
| 6.19.74 | Order Consolidating Cases, dated |
| 6.28.74 | Respondent's Answer in Case No. 23-CA-5062, received |
| 6.28.74 | Respondent's Answer in Case No. 23-CA-5063, received |
| 8.15.74 | Hearing opened |
| 8.15.74 | Hearing closed |
| 9.30.74 | Administrative Law Judge's Decision, issued |
| 11. 4.74 | General Counsel's Statement of Exceptions to the Administrative Law Judge's Decision, received |
| 6.18.75 | Decision and Order issued by the National Labor Relations Board |



[Dated 6/18/75] [D—9579 Houston, Tex.]

* * * * *

## DECISION AND ORDER

On September 30, 1974, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Respondents and the Union have had a collective-bargaining relationship for more than 25 years, marked by a series of collective-bargaining agreements, the last of which expired in July 1973, after extension by the parties from

[221]

March 6. These facts, although not specifically relied upon by the Administrative Law Judge, support his basic conclusions that the Union enjoyed a presumption of majority support and that such presumption continued even after the expiration of the agreement.[1]

---

1. *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho and Its Employer-Members,* 213 NLRB No. 74, sl. op. p. 5 (1974).

It is well-settled Board law that the effect of such a presumption renders an Employer's refusal to bargain *prima facie* unlawful, and that the *prima facie* case can be refuted if the Employer affirmatively establishes certain grounds for its refusal.[2]

Here the Respondents have shown that less than a majority of employees had submitted checkoff authorizations prior to the time Respondents refused to continue bargaining. The Administrative Law Judge noted the absence of independent violations of Section 8(a)(1) and concluded that Respondents were entitled to doubt majority support inasmuch as union "membership" had always been expressed by the number of employees on the checkoff list and the list was less than half the number actively employed, thus the Respondents had objective evidence forming a reasonable basis to doubt that a majority of employees supported the Union. We disagree.

It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose to give it their financial support *or* participate as members.[3]

[222]

More than 3 months after Respondents stopped implementing checkoff, the Union submitted new checkoff cards

2. *Celanese Corporation of America,* 95 NLRB 664 (1951).

3. See *Terrell Machine Company,* 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929; *N.L.R.B. v .Gulfmont Hotel Company,* 362 F.2d 588, (C.A. 5, 1966).



in an attempt to remove a disagreement over the wording of these cards from future bargaining. Notwithstanding evidence that the number of proffered cards did not represent a majority of Wald's employees when submitted in October, and the lack of evidence in this record that they reflected a majority of Westheimer's employees at any time, the Respondents were continuing to bargain in February 1974, when payroll records referred to by the Administrative Law Judge showed that some of the October signers were not then employed. Two months later the parties were about to finalize the agreement.

At the April 11 bargaining session, held to resolve any remaining differences among the parties and to sign the agreement, Respondents refused to continue bargaining, giving no explanation for questioning the Union's majority support; in fact, Respondent Westheimer admitted at the hearing that it did not formulate its doubt until 10 days after the instant charge was filed on April 22. Rather than asking the Union for any evidence of majority support or seeking to resolve any question of support through a Board election, the Respondents waited until the hearing in this case before giving the Union the basis for their alleged doubts.

The record does not reveal the least evidence of employee dissatisfaction with the Union, and Respondents' conduct in continuing to bargain belies an awareness of any dissatisfaction. In fact Respondents presented evidence that the employees had ratified the collective-bargaining agreement in July 1973, though they had received no notice from the Union to that effect.

In all circumstances, including the fact that Texas, where these employees are based, is a right-to-work State, we do not agree with the Administrative

[223]

Law Judge's finding that Respondents could rely upon these checkoff cards, the fact that they may have represented union membership, and the later showing that some of the employees who had given checkoff authorizations were no longer employed, as a reasonable basis for doubting that a majority of the employees continued to desire union representation.

Relying on clearly distinguishable cases,[4] our dissenting colleague charges that we have ignored the well-settled principles which we are, in fact, reaffirming today. While he fails to focus on the crucial issue of whether evidence on which a reasonable doubt of majority support could be based existed at the time of Respondent's refusals, Member Kennedy exaggerates the significance of the number of signed checkoff authorizations. Our colleague has by necessity ignored the fact that in this right-to-work State employees who support a union are not required to agree to dues checkoff. It is not irrelevant that the question of majority arises in a right-to-work State. It is

4. The cases cited by Member Kennedy are clearly inapposite to the case under consideration. In *Southern Wipers, Inc.*, 192 NLRB 816 (1971), the Board found reasonable grounds to doubt that majority support existed when the union and employer had not communicated for about 6 months during which period the union appeared to be totally inactive, several employees indicated their dissatisfaction with the union, and the work force of 100 employees suffered a turnover of 389 employees. In *Viking Lithographers, Inc.*, 184 NLRB 139 (1970), the Board also found factors which could support a reasonable doubt. After the parties had not communicated for several months and several employees had expressed dissatisfaction with the union, and only 4 of the original employee complement of 21 remained in a unit of 25, the union informed the employer that it agreed to the employer's "last offer," which in the circumstances of that case was even difficult to ascertain. The union's total capitulation was viewed as an attempt to forestall a loss of its status as bargaining representative.



rather the crux of the matter. Member Kennedy persists in reliance upon cases distinguishable on the facts. He calls attention to decisions of the Courts of Appeals for the Fifth and Sixth Circuits, wherein doubt of majority was based essentially on decertification

[224]

petitions having been filed. The *Anvil* case (*Anvil Products, Inc.*, 205 NLRB No. 80 (1973) which went to the Fifth Circuit involved limited strike support as an additional objective consideration. Member Kennedy fails to note that the Fifth Circuit has specifically recognized the impact of a lack of compulsory checkoff on the majority issue in *Gulfmont, supra* at 591-592:

> No one knows how many employees who favored the unions had decided not to authorize the Company to deduct union dues or how many who favored union bargaining were not even members of the union.
>
> * * * * *
>
> It is fairly plain that the company's conclusion that the majority support for the union was lacking was based on the knowledge that a larger number (exceeding by more than the 5 majority, by which the election had been won), had been struck from the checkoff list than had been added to it.
>
> The flaw with the respondent's reasoning here is that there is no necessary connection between the checkoff list and the number of union supporters. *There was no compulsory checkoff.* [Emphasis supplied] * * *

> * * * comparison of the checkoff lists and a comparison of additions and subtractions from the list, in a legal sense, showed nothing with reference to what percentage of the 186 employees on September 30th still wished to have their bargaining unit represented by the unions. The effort by the company to challenge the unions' status by reliance upon such information therefore does not arise to the dignity of substantial evidence to justify a doubt of the continuing majority status.

The dissent concludes that when the Union attempted to collect new checkoff cards with the intent of showing employee support,[5] it failed to get a majority

[225]

of employees to sign the cards and, therefore, cannot be presumed to enjoy majority support. We cannot accept such a conclusion, particularly when there is no showing in this record that, prior to the new cards being proffered, a majority of employees had ever executed checkoff cards. In fact, there is no showing that a majority of employees

5. As the dissent discussion shows, the Union, rather than attempting to evidence majority support, collected the cards in an attempt to remove a divisive issue in negotiations concerning the wording of the legend on the face of the checkoff cards. However, concerning the final negotiating session, the disent implies that Manuel's agreement to adjourn was "promptly" arrived at because of concern over the majority issue, whereas, according to Respondents' counsel, the parties were discussing a picket line clause after the majority question was raised as to one Respondent. Manuel, in essence, testified that the purpose of adjournment was to allow Respondent's counsel an opportunity to ascertain more facts. Both witnesses were found by the Administrative Law Judge to be candid and truthful.



had ever agreed to checkoff at any time during the more than 25 years of collective bargaining between the parties.

Our colleague points to Respondents' understanding that union members were always on checkoff and to the union president's testimony supporting this belief. Confusing union membership with union support, the dissent fails to consider the lack of evidence that less than a majority of employees wished this Union to represent them at the time of the Respondents' refusals. Here, the Respondents had stopped honoring checkoff 9 months before their refusal to bargain. There is no evidence that Respondents had any knowledge with respect to how many employees were paying dues directly to the Union. In fact, officials of both Respondents testified, in essence, that employees could be doing just that.[6]

Our colleague would put the onus on the Union to file a petition, a resolution of this case for which we see no justification. At the time of the refusal to bargain, Respondent Wald offered no basis for its alleged doubt and the record clearly shows that Respondent Westheimer did not formulate its alleged doubt of majority support until well after its refusal to bargain and not even until several days

[226]

after the charge herein was filed. Faced with these circumstances, we do not believe an incumbent union in a right-to-work State has an obligation to evidence its

6. Simply as an example of the marked disparity in numbers between union members and unit employees that may exist in a right-to-work State, we note that this panel recently considered a contract-bar issue in the context of a unit of 700 of whom only 40 were members. *Thiokol Corporation*, 215 NLRB No. 138 (1974).

presumed majority support through the Board's election process.

Our colleague sees an election pursuant to an RM petition as unlikely under current Board precedent, citing *Bartenders of Pocatello, supra,* footnote 1, where the contract had a voluntary checkoff clause which, as a roadblock in determining continuing majority, tends to equate with a state law protecting the right to work without union membership. But the basic reason an election is not directed in such cases is the statute-engendered Board purpose to foster stability in collective bargaining when there are no truly objective considerations for doubting the continued existence of majority support. Like the Administrative Law Judge, our colleague would elevate a mere questioning of majority, apparently based only upon the number of checkoffs in a right-to-work State, to an acceptable objective consideration, no unfair labor practice having followed.

We cannot agree that "common sense" dictates that this Board require the Union to seek an election when there is no showing that since the Texas right-to-work law was enacted in 1947 it has ever had a majority of unit employees on checkoff, or that the Respondents have seen fit to question that fact, and where it appears that, for the last 9 months before the hearing, the Respondents have not been implementing the checkoffs which were furnished. We certainly intend no downgrading of the importance of Board elections. However, there are circumstances, as here, in which the question generated by the Employer does not justify this Board's dismissing a refusal-to-bargain allegation.[7]

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7. Compare *Southern Wipers, Inc., supra,* fn. 4, and *Viking Lithographers, Inc., supra,* fn. 4.



[227]

We believe that Respondents' conduct here, particularly in waiting until the final bargaining session before questioning the Union's majority support without giving any explanation for their alleged doubt, constitutes a refusal to bargain in good faith. We regard the evidence presented as too speculative to support Respondents; asserted good-faith doubt of majority when they refused to bargain on April 11, 1974.

Accordingly, we find that Respondents have since April 11, 1974, and at all times thereafter, refused to bargain collectively in violation of 8(a)(5) and (1) of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Wald Transfer & Storage Co., Houston, Texas, and Westheimer Transfer & Storage Co., Inc., Houston, Texas, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, house, and other terms and conditions of employment with General Drivers, Warehousemen and Helpers, Local No. 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of their employees in the following appropriate unit:

All drivers, helpers, warehousemen and craters employed by Respondent at its Houston, Texas place of business, exclusive of all guards, watchmen and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

[228]

2. Take the following affirmative action which the Board finds will effectuate policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at their facilities in Houston, Texas, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

8. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."



(c) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

[229]

3. IT IS FURTHER ORDERED that the portion of the complaint alleging Respondents to have violated Section 8(a)(5) and (1) of the Act by resort to evasive and dilatory tactics be, and it hereby is, dismissed.

Dated, Washington, D.C. June 18, 1975.

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

MEMBER KENNEDY, dissenting:

This is another case in which the majority ignores the well-settled principle that "an employer may lawfully withdraw recognition from an incumbent union because of an asserted doubt of the Union's continued majority of its assertion of doubt is raised in a context free of unfair labor practices and is supported by a showing of objective considerations providing reasonable grounds for a belief that a majority of the employees no longer desire repre-

sentation."[9] The dismissal of the complaint by the Administrative Law Judge should be affirmed.

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9. *Southern Wipers, Inc.*, 192 NLRB 816; *Viking Lithographers, Inc.*, 184 NLRB 139. The observation by my colleagues that these cases are inapposite is reminiscent of the majority's observation with respect to my dissent in *Automated Business Systems, a Division of Litton Business Systems, Inc., a Subsidiary of Litton Industries, Inc.*, 205 NLRB No. 35 (1973). The Sixth Circuit agreed with my dissent and refused to enforce the Board's 8(a)(5) finding. 497 F.2d 262 (1974). My colleagues' discussion with respect to what constitutes "a reasonable doubt of majority support" is also reminiscent of the majority decision in *Anvil Products, Inc.*, 205 NLRB No. 80, in which I dissented. After the Fifth Circuit denied enforcement of the 8(a)(5) finding and bargaining order, the Board agreed in its Supplemental Decision and Order, 216 NLRB No. 28 (1975), "that Respondent had a valid, objective basis for doubting the Union's majority status when it withdrew recognition from the Union."

My colleagues' allegation that I have ignored the fact that Texas is a right-to-work State is no more than a diversionary tactic. It is totally irrelevant that these cases arise in a right-to-work State.

Likewise, the majority's attempt to make much of the fact that checkoff is not compulsory is irrelevant. Surely my colleagues do not expect employees on *compulsory* checkoff to express their desire not to support the Union by canceling checkoff and losing their jobs. Obviously, only in a noncompulsory checkoff situation can an employee voluntarily exhibit his support of the union—or, in the instant case, his desire not to support the Union—by authorizing, or withholding authorization of, checkoff. Only in such a noncompulsory situation, then, can checkoff authorizations provide any indication of union support or lack thereof.

The statement by my colleagues that the Fifth Circuit in *Gulfmont* specifically recognized the impact of a lack of compulsory checkoff on the majority issue is a misinterpretation of that case. In *Gulfmont* the union "expressly asserted that in addition to the members on checkoff, they had 'an excess number of members . . . who are not on checkoff' . . . ." 147 NLRB 997 at 1002. There is no such assertion here. Rather, the Union's president admits that he never knew of a union member at either Employer who was not on checkoff. Moreover, in *Gulfmont* the union had won an election by a close vote and had been certified. Shortly before the expiration of the initial collective-bargaining contract, the employer refused to bargain, basing its doubt of the union's majority exclusively on the number of employees on checkoff. Here, however, there has never been a certification, and the evidence casting doubt on the Union's majority status is based not only on the number of unit employees on dues checkoff, but on the number of union members as well.



[230]

The facts in this case are largely undisputed. Respondents have a long history of continuous collective bargaining with the Union since at least the late 1940's. The most recent collective-bargaining agreement between the Union and Respondents terminated on March 6, 1973. On May 22, 1973, the parties agreed to extend the old contract retroactively from March 7 to July 9. No dues were checked off by Respondents after July 1973. Negotiations for a new contract were complicated by the fact that the expired contract consisted of 6 pages and the Union's proposal included some 30 pages from a standard form industry contract.

As found by the Administrative Law Judge, when the parties adjourned on July 9, 1973, Union Representative Boyd informed Respondents that their position

[231]

on four unresolved issues was not acceptable to the Union and that he would not recommend that the employees accept the Respondents' proposed contract. As the parties left the meeting room, Boyd asked, "You are not going to take an economic strike over this, are you?" A meeting of employees was held early on the morning of July 13. Employees of each Respondent reported to work and stated that the employees had ratified the agreement.

The Union did *not* advise Respondents that their proposal had been accepted. The first contact that Respondents had from the Union was 2 or 3 weeks later when Union Representative Boyd called at the office of counsel for Respondents and said: "Well, I have got to have some

relief on this check-off thing. . . . It just won't fly the way you proposed it to us. We can't change the form of the written authorization without the approval of the International, and we're not about to go to the International for approval." Boyd then proposed: "Would you agree to a provision in the contract that would recite that they're revocable as you proposed in the contract, but that we use the same check-offs that are presently in existence, and anyone that we get in the future would be on the same form." Counsel for Respondents objected and urged that the checkoff form should contain the same escape language that the Respondents had proposed in the contract negotiations. Boyd declined Respondents' suggestion, asserting that he would have to get the International's approval. Boyd then volunteered "but maybe if I get new ones signed up, maybe your clients will feel that the employees who may have signed in the past and couldn't get out because they couldn't read or didn't know the escape." Counsel for Respondents advised that Boyd was free to do what he wanted, but that he doubted that it would work.

[232]

There were no further discussions with Respondents or their counsel until the union president called Respondents' counsel on December 10, 1973. However, in November each Respondent received from the Union a group of checkoff authorization cards which were executed late in October. Wald received 21 checkoff cards bearing the names of its employees. Westheimer received 17 checkoff cards bearing the names of its employees. No additional cards were ever submitted to either Respondent.



I have set forth what transpired with respect to the checkoff cards because it establishes that Respondents' asserted doubt of the Union's majority status on April 11, 1974, was supported by evidence of objective considerations.[10] When doubt of the Union's majority status was expressed, there were at most 13 union checkoff authorizations in a unit of 38 employees of Respondent Westheimer, and of the 41 unit employees of Respondent Wald only 18 had executed union checkoff authorizations.

My colleagues concede that authorization cards for the Union did not constitute a majority in the bargaining unit at either Wald or Westheimer. I reject the majority's suggestion that the Union's failure to get a majority of checkoff cards is not evidence of lack of union support.[11] The Administrative

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10. My colleagues acknowledge that "Respondents have shown that less than a majority of employees had submitted checkoff authorizations prior to the time Respondents refused to continue bargaining." Their discussion totally ignores the fact that the Union for reasons of its own volunteered to get the new checkoff cards for Respondents. Having failed to get a majority of cards in either unit, it cannot be presumed that the Union enjoys majority support.

11. This Board should not engage in sophistry in presuming majority in cases of this type. The Board has long known that "Proof of majority is peculiarly within the special competence of the union. It may be proved by signed authorization cards, dues checkoff cards, membership lists, or any other evidentiary means. *An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity.*" [Emphasis supplied.] *Stoner Rubber Company, Inc.*, 123 NLRB 1440, 1445 (1959). And yet, notwithstanding the fact that unions have the special competence to prove majority, my colleagues attempt to impose an incorrect burden upon employers. See *United Supermarkets, Inc.*, 214 NLRB No. 142, fn. 10 (1974). Reviewing courts have held, quite properly in my opinion, that the General Counsel has the burden of proving majority if the employer offers "evidence to cast serious doubt on the Union's continued majority status." *Lodges 1746 and 743,*

[233]

Law Judge correctly found the fact that it had been the understanding of the officials of both Respondents that all union members were on checkoff was of "major significance." Even Union President Manuel testified that he never knew of a union member at either Wald or Westheimer who was not on checkoff. Union members did not pay dues directly to the Union. Indeed, after Respondents ceased checking off dues in July 1973, the Union made no effort to collect dues from employees of Respondents until January 13, 1974, when the question of self-payment was discussed at a union meeting attended by only three employees from Wald and only seven employees from Westheimer. As a result of that meeting, business representatives were instructed to collect dues. When business agents visited the plants in both January and February 1974, only "a very nominal number" paid their dues to the Union. It is clear that no dues were checked off by the Respondents after July 1973, and the dues collected from a "nominal number" in January and February 1974 constituted the only dues paid to the Union after July 1973.

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*International Association of Machinists and Aerospace Workers, AFL-CIO [United Aircraft Corporation] v. N.L.R.B.*, 416 F.2d 809, 811-812 (C.A.D.C., 1969), cert. denied 396 U.S. 1058 (1970); *The National Cash Register Company v. N.L.R.B.*, 494 F.2d 189, 194 (C.A. 8, 1974); *N.L.R.B. v. The Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1090-91 (C.A. 8, 1969); *N.L.R.B. v. Dayton Motels, Inc., d/b/a Holiday Inn of Dayton*, 474 F.2d 328, 331 (C.A. 6, 1973); *Automated Business Systems, a Division of Litton Business Systems, Inc. v. N.L.R.B.*, 497 F.2d 262, 270 (C.A. 6, 1974). See also *N.L.R.B. v. Laystrom Manufacturing Co*, 359 F.2d 799 (C.A. 7, 1966).



[234]

My colleagues suggest that Respondents should have asked the Union for evidence of majority support or sought a Board election. When the counsel for Respondents expressed doubt of majority, Union President Manuel agreed to adjourn the meeting promptly. There is not the slightest suggestion in this record to indicate the Union possessed evidence of majority. Indeed, it was the Union's limited number of checkoff cards and the limited number of names on the monthly printout lists sent by the Union to Respondents which caused Respondents to question the Union's majority.[12] What purpose would have been served by Respondents seeking a Board election? Parties are not required to perform a futile act. It is clear that the Board would not have conducted an election had Respondents filed an RM petition. See Bartenders, Hotel, Motel, and Restaurant Employers Bargaining Association of Pocatello, Idaho and Its Employer-Members, 213 NLRB No. 74, in which I dissented. On strikingly similar facts, my colleagues dismissed the employer's RM petition and found a refusal-to-bargain violation even though the union had only 115 members in a unit of 308 employees.[13]

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12. The Board has required employers to bargain even though the union admitted that it did not have a majority. See my dissent in *United Supermarkets, Inc.*, 214 NLRB No. 142, sl. op. pp. 12-13 (1974).

13. The Board's mechanistic application of its blocking charge rule to deny employees the opportunity to express their choice of a bargaining agent in a Board-conducted election has been criticized by the Fifth Circuit. See *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064 (C.A. 5, 1971); *Algie v. Surratt v. N.L.R.B.*, 463 F.2d 378 (C.A. 5, 1972); *N.L.R.B. v. Anvil Products*, 496 F.2d 94 (C.A. 5, 1974), denying enforcement of 205 NLRB No. 80. On remand the Board agreed in its Supplemental Decision with my original dissent that the employer "had a valid, objective basis for doubting the Union's majority status when it withdrew recognition." 216 NLRB No. 28.

I simply do not understand my colleagues' rejection of the following conclusion of the Administrative Law Judge:

[235]

> There was absolutely no evidence presented to show that the Respondents have sought to undermine and destroy the Union since expressing their doubt concerning the Union majority status. There were no allegations in the complaint or evidence presented of independent Section 8(a)(1) violations. *More objectivity of Respondents' considerations before expressing doubt of the Union's majority status would seem hard to find.* With full knowledge that the membership of the Union has always been expressed by the number of employees on the check-off list, when that list totaled less than one-half of the employees actively employed, it seems perfectly logical that the Respondents, and each of them, was entitled to doubt the Union's majority. *The objectivity certainly cannot be questioned, because a simple count of the number of employees employed and a count of the number of employees on the check-off list, has to be the same regardless of one's subjective prejudices and bias. In a context free of unfair labor practices these factors provide an objective basis which properly furnish a reasonable basis for the Respondents to believe the Union had lost its majority status.* [Footnotes omitted; emphasis supplied.]

I have stated previously that this Board should follow "common sense" in deciding cases of this type and recognize that "this legal business of a 'rebuttable presumption' " to reach a wholly unrealistic result serves no useful purpose.[14] Highly relevant are the observations of the court in *N.L.R.B. v. Laystrom Manufacturing Co.*, 359 F.2d 799 (C.A. 7, 1966). The court stated at 801:



> We add that with respondent's long-time good faith dealing with the Union, there is no basis for a reasonable inference that it abruptly changed its course of conduct and for the first time acted in bad faith in raising the issue as to the Union's majority. Good faith is not a one-way street. The Union's refusal, when challenged, to submit the issue to an election where each employee would be permitted in secrecy to make his choice, leads to the inescapable inference that it, too, was doubtful and fearful of the result. As the Trial Examiner stated:
>
> > And it is equally reasonable to speculate that a union may prefer to let the Board handle its hot chestnuts with tongs of technicalities instead of going to an election. A suspicion is not alien in the setting described above that perhaps the Union doubts that it could win an election today.

[236]

I agree with the Seventh Circuit that we should not try to handle a union's "hot chestnuts with tongs of technicalities." The Supreme Court and the Board have both acknowledged that our election procedure is the superior way to ascertain whether there is majority support for

14. See my dissent in *Automated Business Systems, a Division of Litton Business Systems, Inc.*, 205 NLRB No. 35 (1973). enforcement denied 497 F.2d 262 (C.A. 6, 1974).

a union. It was recognized in *N. L. R. B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), and recently repeated in *Linden Lumber Division, Summer & Co. v. N. L. R. B.*, 419 U.S. 301 (1974). In the *Linden* case, the Court pointed out that a union has two alternatives available to it when an employer refuses recognition: "It can file for an election; or it can press unfair labor practice charges against the employer under *Gissel*. The latter alternative promises to consume much time. In *Linden* the time between filing the charge and the Board's ruling was about 4-½ years; in *Wilder*, about 6-½ years. The Board's experience indicates that the median time in a contested case is 388 days. *Gissel*, 395 U.S., at 611 fn. 30. On the other hand the median time between the filing of the petition for an election and the decision of the Regional Director is about 45 days. In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored."[15] 419 U.S. at 306. I respectfully suggest that my colleagues' decision herein does not encourage elections and it does not promote the prompt resolution of majority questions.

[237]

Respondents committed no unfair labor practices which would have made a free election impossible. An election could have been held without delay to determine if the

15. In fiscal year 1974, the Board's Regional Offices conducted 8,976 elections. Of this total, 81 percent were conducted promptly pursuant to a voluntary agreement of the parties. In the remaining 19 percent of the election cases, hearings were held, but even in those contested cases the Board's Regional Directors issued their Decisions and Directions in a median time of only 42 days after the petition for an election was filed. 39 NLRB Ann. Rep. 13-16 (1974).



Union in fact had the support of a majority of the unit employees. On this record, there is no reason to doubt that if the Union had won the election the parties would have quickly resumed their negotiations. A year has now elapsed without bargaining. Another year may expire before the issue is settled in the courts. Instead of taking the expeditious election route, the Union has resorted to an unfair labor practice proceeding, with its accompanying delay, in the hope that this Board and a reviewing court will force upon the employees a bargaining agent which they would reject in a freely conducted secret election.

I think the decision of my colleagues in this case has the necessary effect of downgrading the role and importance of our elections and does not serve the long-range interests of employees, unions, or employers.

Dated, Washington, D.C. June 18, 1975.

Ralph E. Kennedy, Member
NATIONAL LABOR
RELATIONS BOARD

[238]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with General Drivers, Ware-

housemen and Helpers, Local No. 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of our employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All drivers, helpers, warehousemen and craters employed by Respondent at its Houston, Texas place of business, exclusive of all guards, watchmen and supervisors as defined in the Act.

WALD TRANSFER & STORAGE CO.
(Employer)

Dated _____ By _____
(Representative) (Title)

WESTHEIMER TRANSFER & STORAGE CO., INC. (Employer)

Dated _____ By _____
(Representative) (Title)



**This is an official notice and must not be defaced by anyone.**

**This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.**

**Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, Suite 920, 500 Dallas Avenue, Houston, Texas 77002, Telephone 713-226-4812.**

## APPENDIX C

[204]

[Dated 9/30/74]

[JD-(SF)-174-74
Houston, Texas]

* * * * *

### DECISION

#### Statement of the Case

JAMES T. RASBURY, Administrative Law Judge: This case was heard in Houston, Texas, on August 15, 1974, upon two complaints issued by the General Counsel of the National Labor Relations Board (herein Board) and the answer filed by each of the Respondents, Wald Transfer & Storage Co. (herein Wald), and Westheimer Transfer & Storage Co., Inc. (herein Westheimer), each dated June 27, 1974.[1] An order consolidating these two cases was dated and served on the parties the 19th day of June, 1974.

The two Respondents in this case are entirely separate corporations with no common ownership, but have been joined in this consolidated complaint because the Respondents conducted joint negotiations with the Charging Party, Local 968. The complaints allege that the Respondents refused to bargain with employees in an ap-

1. The complaint in Case No. 23-CA-5062 was served on Respondent Wald on or about June 19, 1974, based on a charge filed by the Charging Party on April 22, 1974, and thereafter served on Respondent. The complaint in Case No. 23-CA-5063 was served on Respondent Westheimer on or about June 19, 1974, based on a charge filed by the Union on April 22, 1974, and thereafter served on the Respondent.



propriate unit and (2) engaged in dilatory and evasive tactics in order to frustrate and evade the consummation of a final and binding

[205]

collective-bargaining agreement, which conduct is in violation of Section 8(a)(5) and (1) of the Act. Helpful briefs have been received from the Charging Party, the Respondents and the General Counsel.

Upon the entire record in these proceedings, and from my observation of the demeanor and testimony of the witnesses, I hereby make the following:

#### Findings of Fact

#### I. Jurisdiction

Respondent Wald is, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business in Houston, Texas, where it is engaged in the business of transporting goods by truck and the moving, storing and warehousing of residential and commercial goods. During the past 12 months, which is a representative period, Wald, in the course and conduct of its trucking operations within the State of Texas, derived gross income in excess of $1,000,000. In excess of $50,000 of this amount was received pursuant to contracts or arrangements with and/or as agents for Mayflower Moving and Storage Company operating among the various states of the United States.

Respondent Westheimer is, and has been at all times material herein, a corporation duly organized under and

existing by the virtues of the laws of the State of Texas, having its principal office and place of business in Houston, Texas, where it is engaged in the business of transporting goods by truck and moving, storing and warehousing residential and commercial goods. During the past 12 months, a representative period, Westheimer in the course and conduct of its trucking operations within the State of Texas, derived gross revenue in excess of $2,000.000. In excess of $50,000 of this amount was received pursuant to contracts or arrangements with and/or as agent for Allied Van Lines, Inc., operating among the various states of the United States.

Upon the basis of the aforementioned facts, which are admitted by the Respondents, I herewith find that the Respondents Wald and Westheimer, are employers engaged in a business which is an essential link in commerce and which does affect commerce within the meaning of Section 2(6) and (7) of the Act.

## II. The Labor Organization

General Drivers, Warehousemen and Helpers, Local No. 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

## III. The Unfair Labor Practices

### A. *The Issues*

A resolution of the matters involved herein necessitate, first, a determination to be made as to whether the unusual



delay, passage of time and failure of the Respondents and the Charging Party to reach an agreement

[206]

was the result of deliberate dilatory and evasive tactics by the Respondents in an effort to avoid their legal bargaining obligation; and, secondly, was the Respondents refusal to bargain on and after April 11, 1974, predicated on a good faith and reasonably grounded doubt of the Union's continued majority status.

### B. *The Evidence*

The parties involved herein are not in serious disagreement as to the essential facts involved.[2] The Union and the Respondents have had a bargaining relationship that dates back to at least the mid-forties. The most recent contract covered the period from March 7, 1970, through March 6, 1973. Attorney I. J. Saccomanno was chief negotiator and spokesman on behalf of both Respondents Wald and Westheimer in the jointly conducted negotiations with the Union. Business Representative L. W. Boyd was chief negotiator and spokesman for the Union. The parties participated in several contract negotiating sessions in March, April, May and July, 1973, seeking to negotiate an agreeable contract which would have succeeded the most recent one that expired on March 6, 1973. The parties, by agreement, had extended the most recent con-

2. Manuel testified to a comment allegedly made by Saccomanno in February 1974, which was denied by Saccomanno. Both Manual and Saccomanno appeared to be candid, truthful witnesses, and there is no basis to credit one witness over the other as to this statement. In any event, I find it unnecessary to resolve this conflict because the alleged statement, if made, is not proof of a violation of the Act and is not determinative in my decision.

tract to July 9, 1973. At the conclusions of the negotiating session on July 9, 1973, there were three or four items still not agreed to, but the Companys' positions on these items had been rather definitively set forth. One of the unresolved issues concerned the phrasology or language that was used in the "check-off" forms. The difference in their respective positions related to the waiting period or time when an employee might revoke his written "check-off authorization." At the close of the negotiating session on July 9, there was an oral agreement to extend the contract until July 11. Boyd informed the Respondents that their position on the unresolved issues was not acceptable and that he was not going to recommend acceptance of the proposed contract.

Saccomanno testified, and it was not disputed, that company officials observed union notices posted, or distributed, on July 12 indicating that there was to be a meeting of the employees very early Friday morning, July 13. When the employees reported for work on July 13th, an employee informed each of the employers that the employees had voted to ratify the agreements. Neither of the Respondents, however, officially heard from the Union that the proposed contracts had been accepted by the employees or had been approved by the Union. During late July or early August of 1973, Saccomanno and Boyd met on two or three occasions in an effort to resolve their differences in the language relating to the "check-off authorizations". Nothing was finally resolved

[207]

between Saccomanno and Boyd on this issue. However, in November, each of the Respondents received from the



Union a group of "check-off authorizations" cards which had been dated during the month of October, 1973.[3]

Nothing further was heard from the Union until December, however, during this intervening period, L. W. Boyd, who had been handling the negotiations for the Union, ceased his employment with the Union.

On December 10, Willard Manuel, president of the Union, contacted Saccomanno and asked Saccomanno to prepare a draft of the contract that had been agreed to between Saccomanno and Boyd. Saccomanno agreed to prepare such a draft and indicated to Manuel that the parties could probably get together the later part of January 1974 to review his draft. Saccomanno was contacted twice during January by Manuel concerning the proposed contract draft but Saccomanno had been unable to prepare the drafts. On February 14, Manuel contacted Saccomanno and upon learning that the draft contract had not been prepared, he suggested that he (Manuel) would make an effort to locate Boyd and would work with Boyd in an effort to prepare a draft and then get back to Saccomanno. Manuel promptly prepared the drafts and forwarded them to Saccomanno and proposed a meeting date in early March. Saccomanno and Manuel met on March 15 to consider the draft as prepared by Manuel. Although Saccomanno had questions concerning a number of provisions in the contract, nevertheless, the parties were able to agree on all but three provisions. These were characterized as (1) check-off authorizations, (2) over-

3. Respondents' Exhibit 6(a) through 6(u) reveals the names of 21 employees of Respondent Wald for whom deductions were to be made. Respondents' Exhibit 8(a) through 8(q) reveals the names of 17 Westheimer employees for whom the Union submitted "check-off authorization" cards.

time and (3) picket line. According to the testimony of Manuel, the March 15th negotiating session broke up with some mutuality of feeling that the remaining issues could be easily resolved and possibly the contracts finalized within a week. Saccomanno had no definite recollection of any discussion as to when the parties would next get together as the March 15th meeting concluded.

On March 27th, Manuel sent a telegram to Saccomanno stating that he had been unsuccessful in trying to contact Saccomanno in order to arrange for a meeting to conclude the contracts and requested that Saccomanno respond and advise when he would be available for their next meeting. April 1 Saccomanno telephoned Manuel and stated that he would not be able to meet until April the 11th, 1974, because he had just moved into a new office. Although this date was not as early as Manuel would have desired, nevertheless, he agreed to this meeting date.

The meeting of April 11 was relatively brief. Saccomanno advised Manuel that Respondent Wald had expressed a good faith doubt of the majority status of the Union and that he (Saccomanno) had been unable to reach either Jay Hurwitz or Julian Hurwitz of the Westheimer Company to assertain their position, but that he would do so and advise the Union. The meeting terminated without any discussion of the basis for the good faith doubt expressed by the attorney for Respondents. There has been no further contact between the Union and the Respondents since the April 11th meeting. Neither Respondent Wald nor Respondent Westheimer have filed a petition with the Board requesting that an election be held to determine the wishes of the employees.



## C. *Position of the Parties*

### 1. As to the Dilatory and Evasive Tactics

The Union and the General Counsel seek to place all the blame and responsibility for the inordinate delay and failure to conclude a "successor" contract to the one that expired on March 6, 1973, (July 11, 1973, by extention agreements) on the Respondents. This is not entirely accurate. The testimony of Respondent to the effect that as of July 13, 1973, they were each of the opinion their contract offers had been accepted by the employees stand in the record uncontested. Thereafter, the Union negotiator sought to clarify one item (the check-off authorization language) with the negotiator for the Respondents, but without success. Nearly 4 months then elapsed without any effort being made by the Union to conclude the matter.[4]

After the Union again contacted the negotiator for Respondents on December 10, 1973, it may fairly be said that he (Saccomanno) was more responsible for the delay thereafter than was the Union. However, under all the circumstances,[5] I cannot conclude that the time lapse between December 10, 1973, and April 11, 1974, while the parties were endeavoring to reconstruct what had been negotiated and agreed to in the late spring and early sum-

4. It is recognized the Boyd, the chief negotiator for the Union, changed jobs during this period and undoubtedly the relationship with Respondents became "lost" in the mill of routine business during this period of time. Nevertheless, this is only in the nature of a justifiable excuse and did not relieve the Union of its responsibilities and obligations of representing the employees. The employees might very well have regarded themselves as having been abandoned.

5. Saccomanno testified that his daughter was in and out of the hospital on several occasions during this period of time and his law office was moved.

mer of 1973, was deliberate, planned, or caused by the Respondents with a view toward evading their collective-bargaining obligations under the law. In my opinion, both the Union and the Respondents must jointly share the responsibility for the passage of time from July 11, 1973, until April 11, 1974, without concluding a contract, and I shall recommend dismissal of that portion of the complaint alleging the Respondents to be guilty of violating Section 8(a)(5) and (1) of the Act by resort to evasive and dilatory tactics.

(2) The Good Faith Doubt Issue

On April 11, 1974, Saccomanno advised the Union that Respondent Wald had a good faith doubt that the Union represented a majority of the employees.

[209]

With respect to Respondent Westheimer, Saccomanno advised that he had been unable to reach either Jay Hurwitz or Julian Hurwitz, but that he would advise the Union. No other contact or communication occurred between the parties. During the investigation of the charges, the field investigator was advised that both Respondents had a good faith doubt that the Union represented a majority of the employees.

The evidence shows that sometime in November, 1973, the Union submitted a group of "check-off authorization and assignment" cards duly signed by various employees to each of the Respondents. The cards bore various October, 1973, dates and the signature of a witness. There was no evidence to indicate that additional cards were thereafter submitted or that the Union had advised the



Respondents of any changes. Having heretofore indicated that I am of the opinion that the delay between July, 1973, and April, 1974, was the mutual responsibility of both the Respondents and the Union and thus not a violation of the Act, we turn now to the critical period following April 11, 1974.

While it may be argued that a definitive position as to the "good faith doubt" by Respondent Westheimer was not expressed on April 11, 1974, in view of the clear-cut expression on behalf of Respondent Wald and the failure of either the Union or Westheimer to do anything further, it is not unreasonable to regard April 11 as the critical date for both Respondents. The question to be resolved then is: Did Respondents have a good faith and reasonably grounded doubt of the Union's continued majority status on and after April 11, 1974?

There was evidence introduced[6] showing that there were 38 employees on the payroll of Westheimer in classifications included within the bargaining unit as of February 17, 1974.[7] As of May 19, 1974, there were 40 employees working in job classifications included within the bargaining unit.[8] During this period of time—February

6. Respondents' Exhibit 9(a) through 9(f).

7. Respondent Westheimer admitted in its answer and Respondent Wald amended its answer at the hearing to admit that: "All drivers, helpers, warehousemen and craters employed by Respondent at its Houston, Texas, place of business exclusive of all guards, watchmen and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

8. The May 19th figures can't be considered as evidence reflecting a frame of mind or "good faith doubt" as of April 11, and I have not done so. The figures are of importance, however, to show a fairly steady number of employees within the bargaining unit during the critical period of time.

1974 to May 1974—there were only 17 names submitted by the Union to Westheimer as being on the "check-off authorization" list. Of this 17, 4 names were not on the February payroll and 6 of the 17 named employees were not on the May payroll.

[210]

Insofar as Respondent Wald is concerned, there was evidence submitted to indicate that there were 41 employees working in the bargaining unit on February 27, 1974. (See Respondents' Exhibit 4). There were 21 names on the "check-off authorization" list [See Respondents' Exhibit 6(a) through 6(u), but three of the employees on the "check-off" list were no longer employed by Wald in February 1974. Sid Wald testified that since the beginning of his employment with Respondent in 1946, it had been his understanding that all union members were on the check-off authorization list. Jay Hurwitz testified that since he began his employment with Respondent Westheimer in 1948, he had never known of an employee that was a member of the Union that was not included on the check-off authorization list. These statements have major significance because they were corroborated by the testimony of President Manuel of the Charging Party who testified that the dues check-off authorization forms have been the only means of collecting union dues.[9]

The General Counsel and the Charging Party argue most effectively for a violation of the Act by Respondents

9. Manuel testified of an effort in January and February 1974 in which individuals were appointed to attempt to collect dues at the employment site, but this method was most unsuccessful and only a few members paid their dues in this manner.



because of (1) the late, or delayed, questioning of the majority status after extensive negotiations;[10] (2) lack of objective considerations in forming a doubt as to the majority status;[11] (3) replacements can be presumed to favor the Union in the same ratio as those replaced;[12] (4) financial support (the "check-off authorizations") is not indicative of the wishes of the majority;[13] and (5) the Respondents neither filed an RM petition or requested the Union to prove its majority status.

## ANALYSIS

The Respondents in its brief cites the *Dimarck Broadcasting Corp.* case, 204 NLRB No. 47, and seeks to analogize the Board's refusal to find an 8(a)(5) violation of the Act in that case with the instant case. In the *Dimarck* case, the Respondent, in the course of negotiating a new contract, requested the Union to prove its majority status. The Union acquiesced to this request and agreed to re-prove its majority. The Board then properly found that because the Union had agreed to re-prove its majority status, the Respondent was not guilty of a "refusal to bargain" by insisting that the Union comply with what it had agreed to do. Clearly, the Dimarck case is not apposite to the instant set of facts.

The law governing this particular set of facts is rather succintly set forth in the *Terrell Machine Company* case, *supra,* which is often cited, but in my opinion frequently misconstrued by knowledgeable labor attorneys.

10. Citing *Vanette Hosiery Mills,* 144 NLRB 164.

11. Citing *N.L.R.B. v. Gulfmont Hotel Co.,* 362 F.2d 588.

12. Citing *Laystrom Manufacturing Co.,* 151 NLRB 1482, 1484.

13. Citing *Terrell Machine Company,* 173 NLRB 1480.

[211]

It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues.[1] This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees.[2] Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The *prima facie* case may be rebutted if the employer affirmatively establishes either (a) that at the time of the refusal the Union in fact no longer enjoyed majority status,[3] or (2) that the employer's refusal was predicated on a good faith and reasonable grounded doubt of the Union's majority status. As to the second of these, i.e., "good faith doubt" two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations[4] and it must not have been advanced for the purpose of gaining time in which to undermine the Union.[5]

1. *Celanese Corporation of America*, 95 NLRB 664, 671-672.

2. Id.

3. "Majority representative status" means that a majority of employees in the unit wish to have the Union as their representative for collective-bargaining purposes. Id.

4. See *Laystrom Manufacturing Company*, 151 NLRB 1482, 1484, enforcement denied on other grounds (sufficiency of evidence) 359 F.2d 799 (C.A. 7, 1966); *United Aircraft Corporation*, 168 NLRB No. 66 (TXD); *N.L.R.B. v. Gulfmont Hotel Company*, 362 F.2d 588 (C.A. 5, 1966), enfg 147 NLRB 997, and c.f. *United States Gypsum Company*, 157 NLRB 652.

5. See *C & C Plywood Corporation*, 163 NLRB No. 136; *Bally Case and Cooler, Inc.*, 172 NLRB No. 106.



In discussing the principles set forth in the paragraph above, the Board finds the Respondent is guilty in the *Terrell* case, but clearly separates its discussion of these applicable principles into the *two* available defenses for the Respondent. The confusion and misapplication of these principles seems to have stemmed from the fact that all too often practitioners utilize the language employed by the Board in discussing the *first* available defense (at time of refusal the Union lacked majority status), when the issue is the employer's *second* available defense, namely, a good faith and reasonable grounded doubt of the Union's continued majority status. In the *Terrell* case, after discussing the presumption of majority status and the assumptions that are applied to support that presumption, the Board found that Respondent had not proved the Union's lack of majority. The Board then went on to discuss the Respondent Company's subjective reasons for doubting that the Union continued to represent a majority of the employees. On the basis of the rather flimsy subjective reasons advanced by Respondent, the Board then found the Respondent to be in violation of their bargaining obligation. In the

[212]

instant case, however, the Respondents have at all times asserted only that they have a reasonable and good faith doubt as to the Union's majority status. (In other words, only the *second* available defense is at issue.) In order to sustain this defense, they must prove that their asserted doubt was based on objective considerations and that their asserted doubt and consequent refusal to bargain must not have been advanced for the purpose of gaining time in which to undermine the Union. Apply-

ing these principles to the evidence presented in this case, I am unable to find the Respondents to be guilty of violating Section 8(a)(5) and (1) of the Act.

There was absolutely no evidence presented to show that the Respondents have sought to undermine and destroy the Union since expressing their doubt concerning the Union majority status. There were no allegations in the complaint or evidence presented of independent Section 8(a)(1) violations. More objectivity of the Respondents' considerations before expressing doubt of the Union's majority status would seem hard to find. With full knowledge that the membership of the Union has always been expressed by the number of employees on the check-off list, when that list totaled less than one-half of the employees actively employed, it seems perfectly logical that the Respondents, and each of them, was entitled to doubt the Union's majority.[14] The objectivity certainly cannot be questioned, because a simple count of the number of employees employed and a count of the number of employees on the check-off list, has to be the same regardless of one's subjective prejudices and bias. In a context free of unfair labor practices these factors provide an objective basis which properly furnish a reasonable basis for the Respondents to believe the Union had lost its majority status.[15]

The Respondents have never said that a majority of the employees may not wish to be represented by the Union. Their position has always been that based upon purely objective considerations, they have a good faith

14. Full consideration has been given to the fact that this is not always true. Most often unions will have multiple means of collective dues, but this was not the case in this situation.

15. *Southern Wipers, Inc.*, 192 NLRB 816.



doubt that the Union represents a majority of the employees. An employer has an obligation to bargain only with a majority union.[16] In fact, an employer places itself in jeopardy by executing a contract with a union where there is evidence reasonably available to indicate that the majority status of the Union is open to serious question.[17] Apparently, the Union was unable to come forward with evidence to present to the General Counsel during the investigative stages of this case that the Union actually represents a majority of the employees and there was no evidence presented at the trial to this effect.

[213]

While I think the Respondents might have been well-advised to have filed and RM election petition with the Regional Office of the National Labor Relations Board, I am not of the opinion that failure to do so totally destroys Respondents' asserted defense, which I have found to be valid. A resolution of the doubt and a determination of the wishes of the employees is a relatively simple matter and can be disposed of by either the Respondents or the Charging Party filing a petition with the Regional Director. This should be done, but I am without authority to order an election. I shall recommend dismissal of the complaint in its entirety.

## Conclusions of Law

1. The Respondents, and each of them, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

16. *International Ladies' Garment Workers Union*, 366 U.S. 731 (1961).

17. See *Andersen Pharmacy*, 187 NLRB 301.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Neither Respondent Wald nor Respondent Westheimer has engaged in the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, as amended, I hereby issue the following recommended:[18]

## ORDER

The complaint is dismissed in its entirety.

Dated: September 30, 1974.

/s/ James T. Rasbury
Administrative Law Judge

18. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.



## APPENDIX D

**UNITED STATES COURT OF APPEALS**
**For The Fifth Circuit**

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**No. 75-2926**

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**NATIONAL LABOR RELATIONS BOARD,**
**Petitioner,**
**v.**
**WALD TRANSFER & STORAGE CO., and**
**WESTHEIMER TRANSFER & STORAGE CO., INC.**
**Respondents.**

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**(Filed July 26, 1976)**

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## JUDGMENT

Before GODBOLD, RONEY and HILL, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondents, Wald Transfer & Storage Co., and Westheimer Transfer & Storage Co., Inc., Houston, Texas, their officers, agents, successors, and assigns on June 18, 1975. The Court heard argument of respective counsel on February 4, 1976, and has considered the briefs and transcript of record filed in this cause. On July 2, 1976, the Court granting enforcement of the Board's order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondents, Wald Transfer & Storage Co., and Westheimer Transfer & Storage Co., Inc., Houston, Texas, their officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: July 26, 1976

Issued as Mandate:



## APPENDIX E

### PETITION FOR REHEARING OF WALD TRANSFER & STORAGE COMPANY and WESTHEIMER TRANSFER AND STORAGE COMPANY, INC.

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*To The Honorable Judges Of The United States Court Of Appeals For The Fifth Circuit:*

Now come WALD TRANSFER & STORAGE COMPANY and WESTHEIMER TRANSFER & STORAGE COMPANY, INC., Respondents, and respectfully petition for rehearing of the Court's decision of July 2, 1976. The Opinion enforced the Order of the National Labor Relations Board finding that the employers Wald and Westheimer refused to bargain in good faith when they declined to continue contract negotiations on the ground that they had a good faith doubt as to whether the incumbent but uncertified union represented a majority of the employees.

This petition is based on the following points:

1. The Court erred in refusing to hold that there is no substantial evidence in the record as a whole which supports the Board's determination that Wald and Westheimer did not have a reasonable basis for a good faith doubt that the bargaining unit majority wished to be represented by the local union.

2. The Court's assertion that there was "the inference of absence of good faith doubt" is based on an erroneous application of an evidentiary presumption.

## STATEMENT

On this petition for enforcement of an Order of the National Labor Relations Board, this Court has concluded there is substantial evidence to support the Board's findings of violation of Section 8(a)(1) and Section 8 (a)(5) of the National Labor Relations Act. The alleged violation found by the Board was that Wald's and Westheimer's refusal since April 11, 1974, to bargain with the Union as the exclusive bargaining representative of their employees was done in bad faith.

This Court did not comment in its Opinion upon the Company's contention that the presumption of majority status relied upon by the Board is based on an erroneous application of the law of evidence.

## POINT OF ERROR NUMBER ONE

THE COURT ERRED IN REFUSING TO HOLD THAT THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE WHICH SUPPORTS THE BOARD'S DETERMINATION THAT WALD AND WESTHEIMER DID NOT HAVE A REASONABLE BASIS FOR A GOOD FAITH DOUBT THAT THE BARGAINING UNIT MAJORITY WISHED TO BE REPRESENTED BY THE LOCAL UNION.

## ARGUMENT AND AUTHORITIES UNDER POINT OF ERROR

The bargaining sessions with Wald and Westheimer was set in a surrounding void of any unfair labor practice.



The evidence clearly shows that over the period of time that bargaining has gone on between the Union and the employers, Wald and Westheimer always evidenced good faith in the labor negotiations with the Union. Most decisions in this area are based on the Board's conclusion that the employer has committed substantial unfair labor practices during bargaining sessions or negotiations which itself evidenced a lack of good faith doubt on the part of the employer. The record is totally void of any such allegations or findings that either Wald or Westheimer committed unfair labor practices during the period of time under scrutiny.

As was pointed out in the Opinion of this Court, the Union was not a certified union. The Board came forward with no affirmative proof of majority status either for Wald or Westheimer. There has been no card check, no election, no certification, no other form of proof. The Seventh Circuit Court of Appeals recently recognized even in a situation in which a union certification existed that to rebut the presumption, the employer need not prove that the Union no longer represents a majority of the employees, but only that at the time it refused to bargain there were sufficient objective considerations to support a reasonable doubt of the Union's majority status. *Star Manufacturing Company v. N.L.R.B.*, 78 L.C. §11,480 (1976). Respondents' brief presented at least 11 factors based on fact to represent their good faith reasonable doubt of the Union's majority status. In response to those factors, the Union produced only the fact that they had less than a majority of employees sign "check off authorization and assignment cards".

## POINT OF ERROR NUMBER TWO

THE COURT'S ASSERTION THAT THERE WAS "THE INFERENCE OF ABSENCE OF GOOD FAITH DOUBT" IS BASED ON AN ERRONEOUS APPLICATION OF AN EVIDENTIARY PRESUMPTION.

## ARGUMENT AND AUTHORITIES UNDER POINT OF ERROR

This Court has held in its Opinion that under the substantial evidence rule, the Board's findings that an inference of absence of good faith doubt must stand because of support in the record. The Board majority relies upon two presumptions that (1) possession by the Union of majority representative status may be presumed from the mere fact of the Respondents' recognition of and dealing with the Union and (2) such status, thus established, is presumed to continue thereafter in the absence of evidence to the contrary.

In the law of evidence, the presumption that a state of things once shown continues to exist does not arise merely upon the basis of some prior presumption. The existence of that which is presumed to continue must originally have been established by evidence. The general rule is stated in 29 Am. Jur. 2d *Evidence* §237 (1967):

> "When the existence of a condition or state of facts is once established by proof, an inference of rebuttable presumption arises that the condition or state of facts continues to exist as before, until the contrary is shown. Such inference or presumption is not a rule of law to be applied in all cases, with or without reason, but rather it calls for the exercise of



> sound discretion by a trial judge according to the likelihood of the persistence of a condition or fact under the circumstances of the case at bar. In general, with the lapse of time such inference or presumption loses probative force."

The Board relies upon the presumption of continued majority status arising out of the voluntary recognition of the Union many years prior to the employers expression of good faith doubt. The presumption or inference is based on no proof in the record supplied by the Board or the Union upon which such presumption can be made.

This Court recognized in the case of *Ref-Chem Company v. N.L.R.B.*, 418 F.2d 127 (5th Cir. 1969), that application of the presumption of a continuing majority is limited by evidentiary considerations of whether it sensibly may be assumed that the *fact* which it purports to establish is true. Not only does the Board rely upon presumption based upon presumption, but the presumption "that possession by the Union of majority representative status may be presumed from the mere fact of the Respondents' recognition of and dealing with the Union" is also based upon a presumption, that being that it is presumed that an employer would not do an unlawful act by entering into a bargaining agreement with representatives of a minority body of the unit.

As was pointed out by the Seventh Circuit in *Interlake Iron Corp. v. N.L.R.B.*, 131 F.2d 129 (7th Cir. 1942):

> ". . . . an inference cannot be piled upon an inference, and then another inference upon that, as such inferences are unreasonable and *cannot be considered as substantial evidence*. Such a method could be extended indefinitely until there would be no more sub-

stance to it then the soup Lincoln talked about that was 'made by boiling the shadow of a pigeon that had starved to death'." At pg. 133 (emphasis added).

This Court's Opinion has allowed the Board to rely, in lieu of evidence, upon presumptions to furnish an inference that there was no basis for a good faith doubt on behalf of the Respondents as to the continuing majority status of the Union as representative of the unit for bargaining purposes. The substantial evidence rule simply will not support the Board's findings under the state of the record before this Court.

Petitioners produced no evidence to show that the Respondents had any anti-union background. There was no evidence of a pattern of conduct hostile to unionism. The evidence failed to show in hiring employees that the Respondents had ever discriminated against Union members or had ever discharged any employee for Union activity. No evidence was produced to show promises of favor or benefits made by Respondents to any of the employees as an inducement for them to withdraw from the Union. The Respondents were justified in assuming that the men either had abandoned the Union or had decided to abandon the Union when no negotiations occurred for over four months. *N.L.R.B. v. Reeder Motor Company,* 202 F.2d 802, 804 (6th Cir. 1953).

In closing, the position that the Respondents found themselves placed in under the facts of this case could not be more poignantly described than the colorful dissertation of Judge John R. Brown, referring to such employers:

". . . But like Odysseus, he stands almost helpless as he makes the perilous passage between Scylla and



Charybdis. If he makes a simple inquiry of each employee and accepts the simple answer, the very pressures apprehended may well bring about the employee's confirmation as well. If he probes deeper, the inquiry unavoidably becomes an investigation and soon it is inescapable that there be insinuations or intimations in terms of relative evaluation of union or non-union conditions. At that point, undefined and undefinable the inquisitor trespasses either on forbidden ground or flounders in the Serbonian bog . . . surrounding it so that what started out to be a means of compliance with law is turned into an affirmative charge of an unfair labor practice. And all the while, all that is done, all that is said, all that is asked, all that is answered, rests in the uncertain recollection of the partisan participants. What begins as the employer's quest now ends in the employer's flight. And now no longer will his conduct be judged alone by what was said. Now, through the unavoidable nature of our legal administrative machinery, . . . it will be judged by what interested partisans say one said was said, or what others said to have said say was said." *N.L.R.B. v. Dan River Mills, Inc.*, 274 F.2d 381, 388-389 (5th Cir. 1960).

## CONCLUSION AND PRAYER

For each and all of the reasons set forth above, Respondents Wald and Westheimer respectfully pray that this Petition for Rehearing be granted and that this Court withdraw its Opinion of July 2, 1976, and deny enforcement of the Order of the Board.

Respectfully submitted,

BRUCE L. JAMES

and

I. J. SACCOMANNO

*Attorney for Respondents, Wald Transfer & Storage Company and Westheimer Transfer & Storage Company, Inc.*

*Of Counsel:*

SACCOMANNO, CLEGG, MARTIN & KIPPLE
2 Houston Center - Suite 800
Houston, Texas 77002 654-4488



## CERTIFICATE OF SERVICE

Two copies of the foregoing Petition for Rehearing have been sent by United States Mail, Certified Mail, Return Receipt Requested to the following:

Mr. Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
Office of the General Counsel
Washington, D.C. 20570

Mr. Louis V. Baldovin, Jr.
Regional Director
Region 23
One Allen Center - Suite 920
500 Dallas Avenue
Houston, Texas 77002

Business Representative
General Drivers, Warehousemen and
Helpers, Local 968, Affiliated
with the I.B.T.C.W.H.A.
3100 Katy Freeway
Houston, Texas 77006

on this the ____ day of August, 1976.

BRUCE L. JAMES

## APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

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No. 75-2926

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,
versus
WALD TRANSFER & STORAGE CO., and
WESTHEIMER TRANSFER & STORAGE CO., INC.,
Respondents.

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On Application for Enforcement of an Order of
The National Labor Relations Board (Texas Case)

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(September 20, 1976)

ON PETITION FOR REHEARING

Before GODBOLD, RONEY and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.